REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E115 OF 2021

MAGDALENE M. MJOMBA...1ST APPLICANT

KWAME S. SHIROYA...2ND APPLICANT

ZABLON M'RINGEERA...3RD APPLICANT

ANTONY K. MUGAMBI..4TH APPLICANT

VERSUS

INFORMATION AND COMMUNICATIONS

TECHNOLOGY AUTHORITY..RESPONDENT

AND

CHAIRMAN CHARTERED INSTITUTE OF

ARBITRATORS..INTERESTED PARTY

RULING

This ruling relates to the Notice of Motion dated 9th March, 2021 in which the Applicants are seeking the following orders;

> **a) Spent**
>
> **b) THAT this Honourable Court be pleased to direct the respondent to appoint an arbitrator for purposes of dispute resolution or in the alternative direct the Honourable Chairman of the Chartered Institute of Arbitrators, Kenya to do so.**
>
> **c) THAT costs of this suit be in cause.**

The application is supported by the collective affidavit of the applicants herein, sworn on the 9th March, 2021. The respondent opposed the application vide a replying affidavit of Dr. Katherine Getao sworn on 29th April 2021. Subsequently, the parties appeared before this court on 4th May, 2021. Parties agreed to determine the application by way of written submissions.

The background of the present application is a dispute arising from consultant contracts dated 1st July, 2018 and 1st July, 2017 between the applicants and the respondent. According to the applicants, Clause 13 of the Consultant Contracts provide for settlement of any dispute arising out of the contracts which cannot be amicably settled between the parties to be referred to adjudication or arbitration. That pursuant to the dispute clause, they wrote a letter dated 23rd November, 2020 to the Chartered Institute of Arbitration for appointment of an arbitrator. They were however informed vide a letter dated 4th December, 2020 that the Contract was silent on the Appointing Authority and that they can mutually agree to review the Clause or seek the court's intervention on the Appointing Authority.

The applicants depone that they asked the respondent to propose an arbitrator vide a letter dated 14th December, 2020. However, the same did not elicit any response thus the present application. In their submissions, the applicants, argue that the respondent in its response confirmed the existence of a contract between them, the premature termination of the said contract and the failure by the parties to agree in line with Clause 13 of the Consultancy Contracts.

The respondent in opposition to the application argues that the application is frivolous, vexatious and is intended for embarrassment for the reason that there is no arbitration agreement as between the parties as envisioned under Section 3 (1) of the Arbitration Act, No. 4 of 1995. It is the respondent's contention that the Consultant Contracts did not provide for arbitration as the exclusive forum for dispute resolution and the application is meant to deny it the right to choose its preferred mode of dispute resolution. Further, the respondent argue that vide a letter dated 3rd September, 2019 and pursuant to Clause 14(d) terminated the Consultant Contract dated 1st July, 2017 on the ground that the applicants' services were no longer required for the project. The respondent maintains that the applicants have failed to reveal the nature of dispute and instead are inviting this court to review the terms of the contract albeit without an arbitration contract. It is the respondent's disposition that the application ought to be dismissed for not meeting the threshold defined in Order 46 Rule 1 of the Civil Procedure Act.

The respondent identified three issues for this courts determination; the validity of the arbitration agreement, appointment of an arbitrator by the court and whether there is a dispute and if so, if the same can proceed within the ambit of the court. On the validity of the arbitration contract the respondent has sought to rely on the case of **Kenya Pipeline Company Limited v Datalogix Limited & Another [2007]eKLR** where Warsame J. (as he then was) while citing the case of **Esmailji vs Mistry Shamji Lalji & co. Civil Appeal No.23/79 K. L. R. (1984) 150** held that it is upon the party applying to the court for reference to arbitration to prove that a matter falls well within a valid and subsisting arbitration clause before the burden can shift to the opposing party to show cause why effect should not be given to the said clause. The respondent further maintains that the arbitration/adjudication process envisioned under Clause 13 is elective and as such the court cannot re-write it and to buttress this the respondent relied on the case of **Wringles Company(East Africa) v Attorney General & 3 Others [2013]eKLR** where the court held that Courts ordinarily ought not and should refrain, as far as is possible, to rewrite contracts of employment. Reliance was also placed on the case of **Danki Ventures Ltd v Sinopec International Petroleum Services Ltd [2014]eKLR** where Ochieng J. rejected the defendant's application to refer the dispute to arbitration on the ground that the arbitration clause was incomplete and did not specify who should be appointed as an arbitrator and held that the court cannot impose on the parties either a particular arbitrator or a method for choosing the arbitrator where the arbitral clause is inoperative.

The respondent further submit that the application before this court was brought under Order 46 Rule 2 and 5 of the Civil Procedure Rules and Section 12 of the Arbitration Act as opposed to Section 6 of the Arbitration Act. It is the respondent's submission that the provision of Section 12 only applies where the court following an application by a party has set aside the appointment of an arbitrator appointed by one party and not in the circumstances of the present case. Reliance has been placed on the case of **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** where the Court of Appeal held that the Court does not have jurisdiction to intervene in any arbitral matter unless otherwise provided for by the Arbitration Act which is a complete code by virtue of Section 10 of the said Act. The respondent has further relied on the case of **Pitstop Technologies Limited v Dynamic Branding Ventures Limited [2020]eKLR** where Majanja J. dismissed an application to appoint an arbitrator as premature and held that it is only after the party has made an appointment under **section 12(4)** of the ***Act***, that the party in default is entitled to move the High Court to set aside that appointment and that it is only after the High Court has dealt with the application to set aside the appointment and allowed the application, that it may, by consent of the parties or on the application of either party appoint a sole arbitrator. Further, the respondent relied on the case of **Nyoro Construction Co. Ltd v Attorney General [2018] eKLR** where Nzioka J. reiterated that under Section 12 of the Arbitration Act, the Court does not have the jurisdiction to appoint an arbitrator but can only descend in the arena where the parties fail to agree on an arbitrator to be appointed.

On whether there is a dispute between the parties and whether the same can proceed within the ambit of this court, the respondent submit that there is no dispute capable of being referred to arbitration. This it argues is because the applicant has not revealed any dispute as between the parties that would warrant referral to arbitration. Reliance has been placed on the case of **County Government of Kirinyaga v African Banking Corporation Ltd [2020] eKLR** where Gitari J. held that the applicant's failure to discharge the burden of proving that there is a dispute falling within the arbitration clause by failing to state with certainty the nature of the dispute and more so that it falls within a valid and subsisting arbitration clause in the agreement means that the burden did not shift to the respondent.

Analysis/Determination

Having considered the pleadings and the submissions by the parties, the issues for determination are;

> **i) Whether there a dispute for determination between the applicants and respondent**
>
> **ii) Whether this court should appoint an arbitrator or direct the Chairman of the Chartered Institute of Arbitrators Kenya to do so.**

In the case of **Adcock Ingram East Africa Limited V Surgilinks Limited [2012] eKLR Musinga J. (as he then was)** held that before a court can order parties to go to arbitration it has to be satisfied that there is indeed a dispute over the claim in issue. It is not in dispute that the parties entered into a Consultancy Agreement which contract was then terminated via a letter dated 3rd September, 2019 under Clause 14(d). The applicant has failed to clearly and precisely demonstrate the nature of the dispute herein, however, a perusal of the record and specifically the applicants' submissions and the letter dated 4th December, 2020. It can be inferred that the dispute relates to the termination of the consultancy agreement and the non-payment of the services rendered thereof. The respondent has not placed any evidence before this court to show that the dispute alluded to by the applicant was resolved or has taken any steps to have the same resolved.

The Consultancy Contract provides for dispute resolution under Clause 13 of Consultancy Contract which provides;

> **"Any dispute arising out of this Contract, which cannot be amicably settled between the parties, shall be referred to adjudication/arbitration in accordance with the laws of the Client's country."**
>
> **This is the Clause that the applicants seeks to invoke to resolve the dispute arising from the contract. The respondent has however argued that Clause 13 above does not qualify as an arbitration agreement as defined under Section 3(1) of the Arbitration Act No. 4 of 1995 as it does not give the arbitration process precedence over the adjudication process. Section 3(1) of the Arbitration Act defines an arbitration agreement as;**

"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

From the record, it is evident that the applicants sought to have the dispute resolved by way of arbitration and wrote to the Chartered Institute of Arbitrators seeking appointment of an arbitrator vide a letter dated 23rd November, 2020. This request was not granted and the reasons thereof were given in a letter dated 4th December, 2020 which consequently informed the applicants' letter of 14th December 2020 seeking to have the respondent appoint an arbitrator. The respondent neither responded to this letter nor disputed the arbitration process initiated by the applicants. It is this non responsiveness of the respondent that made the applicants to file the present application.

I am in agreement that the court should refrain from re-writing what has already been mutually agreed by the parties to a contract as held in **Wringles Company (East Africa) Case (Supra).** The parties herein agreed to have; **any dispute arising out of this Contract, which cannot be amicably settled between the parties, shall be referred to adjudication/arbitration in accordance with the laws of the Client's country.** The referral of any dispute to adjudication/arbitration is mandatory as evidenced in the use of the word **'shall'**. In my view, neither the applicants nor the respondent can wish this away and seek to have the dispute subjected to litigation unless the parties mutually agree. The respondent entered into the agreement which it later terminated. The applicants definitely feel that they are entitled to some compensation for the work done (if any) before the contract was terminated. The matter cannot be wished away.

The only remaining issue is whether this court should appoint an arbitrator. In the present case, the arbitration clause does not indicate the number of arbitrator's and/or the appointing authority. However, it provides that the same would be done in accordance with the laws in the Client's country and as such, the Arbitration Act shall apply. Section 11 of the Arbitration Act provides that the parties to an agreement are entitled to appoint an arbitrator and the process of appointment is provided for in Section 12 of the Act. Section 12 of the Arbitration Act recognises party autonomy by giving each party an opportunity to participate in the appointment of the arbitrator and Section 12(3) of the Act provides what happens when a party defaults or does not participate in the appointment. Section 12(4) then stipulates that once notice has been given to the other party, the party not in default may appoint the sole arbitrator and the arbitrator so appointed shall determine the matter and make a binding award. The applicants are therefore at liberty to appoint an arbitrator.

It is noteworthy that this court does not have original jurisdiction in the appointment of an arbitrator where a party is in default. The Court only comes in after the party has made an appointment under section 12(4) of the Act and the party in default moves to set aside that appointment under Section 12 (5). Further, Section 12(6) and (7) provides that the High Court can only appoint a sole arbitrator after it has dealt with the application for setting aside which appointment can only be by consent of the parties or application by either party.

From the above, it is evident that the applicants' application before this court is quite premature as the applicants have not exhausted their right to appoint an arbitrator under the Arbitration Act. Consequently, the application dated 9th March, 2021 is hereby dismissed. There shall be no orders as to costs.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021.

....

S. CHITEMBWE

JUDGE